

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 05-cv-329-GKF(SAJ)
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

**STATE OF OKLAHOMA'S RESPONSE TO "DEFENDANTS' MOTION  
TO DISMISS COUNT 6 OF SECOND AMENDED COMPLAINT"**

Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma and Oklahoma Secretary of the Environment C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma ("the State"), hereby submits this response in opposition to "Defendants' Motion to Dismiss Count 6 of Second Amended Complaint" [DKT #1235] ("Defendants' Motion"). Defendants' Motion should be denied.

**I. Introduction**

As the Court is aware, in response to Count 6 (Trespass) as pled in the State's First Amended Complaint, Defendants first moved for partial judgment as a matter of law [DKT #1076], arguing that the State lacked standing to pursue a trespass claim. In support thereof, Defendants claimed that standing was lacking because: (1) the State does not own all of the property in the IRW; and (2) the State does not hold an exclusive possessory right. [DKT #1076, p. 13.]

Thereafter, this Court ordered the State to replead Count 6 "to assert those properties over which it has standing to assert a trespass claim." 6/15/07 Hearing Transcript, p. 176. Because

the State has done just that in Count 6 of the Second Amended Complaint [DKT #1215], Defendants' Motion to Dismiss Count 6 should be denied.

## II. Argument

### A. The State has identified a possessory interest sufficient to support a trespass claim

To frame the issues raised by Defendants' Motion, it is necessary to identify at the outset the possessory property interest at issue in the State's trespass claim as pled in Count 6 of the Second Amended Complaint (and not as incorrectly described in Defendants' Motion). Specifically, the State has alleged its possessory interest in the following property:

water in that portion of the Illinois River Watershed located within the territorial boundaries of the State of Oklahoma which runs in definite streams, formed by nature, over or under the surface.

Second Amended Complaint, ¶ 119. Defendants, however, have ignored this plain language of the Second Amended Complaint. The State has not, for purposes of its trespass claim in this action,<sup>1</sup> alleged a possessory interest in "all water" in the Illinois River Watershed, *see* Defendants' Motion, p. 4 (emphasis added), or failed "to identify the specific waters" in support of its trespass claim, *see* Defendants' Motion, p. 4. Rather, for purposes of its trespass claim in this action, the State has clearly alleged a possessory property interest only in the water in the Illinois River Watershed within the State of Oklahoma that runs in definite streams.

"[T]respass involves an actual physical invasion of the property of another." *Fairlawn Cemetery Association v. First Presbyterian Church*, 496 P.2d 1185, 1187 (Okla. 1972). The question before the Court is, therefore, whether the possessory property interest alleged by the State is sufficient to support a trespass claim.

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<sup>1</sup> For purposes of claims in this action other than its trespass claim the State does, of course, assert a broader *parens patriae* / quasi-sovereign interest in all waters located within the Oklahoma portion of the Illinois River Watershed.

Here, the State's possessory interest in the water described above is based on its ownership of such property, which is governed by Oklahoma law. Pursuant to 60 Okla. Stat. § 60(A), entitled "Ownership of water – Use of running water," "[w]ater running in a definite stream, formed by nature over or under the surface" becomes "public water and is subject to appropriation for the benefit and welfare of the people of the state." The statutory phrase "water running in a definite stream" includes lakes. *See Depuy v. Hoeme*, 611 P.2d 228, 231-32 (Okla. 1980).

Such "public water" is "state owned" unless and until it is actually appropriated and beneficially used by another. *See, e.g., City of Stillwater v. Oklahoma Water Resources Board*, 524 P.2d 938, 944 (Okla. App. 1974) ("Nor do we find anything amiss in characterizing the lake contents as 'public' water, hence state owned. . . . [T]he state as original owner still owns the water and will continue to do so until it transfers it to some other person or entity"); *Oklahoma Water Resources Board v. Central Oklahoma Master Conservancy District*, 464 P.2d 748, 753 (Okla. 1969) ("Definite nonnavigable streams are public waters. The state may either reserve to itself or grant to others its right to utilize these streams for beneficial purposes").<sup>2</sup>

Based on the foregoing, the property at issue in the State's trespass claim -- water in that portion of the Illinois River Watershed located within the territorial boundaries of the State of Oklahoma which runs in definite streams, formed by nature, over or under the surface -- is state owned. Thus, the State's ownership interest provides a sufficient possessory interest to support its trespass claim.

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<sup>2</sup> Notably, "[b]oth riparian and appropriative rights are usufructuary only and confer no right of private ownership in the watercourse." *People v. Shirokow*, 605 P.2d 859, 864 (Cal. 1980). Moreover, "[a]n appropriation is not complete until the water is put to beneficial use." Dan Turlock, *Law of Water Rights and Resources*, § 5:49.

Defendants' Motion does not support a different conclusion. As an initial matter, without any citation to authority, Defendants have distilled their untenable position as follows:

Public property is not exclusively possessed by any one person or entity. Because it is open to all, there is no right to exclude others. Thus, it is axiomatic that 'public property' can not be the subject of a trespass claim.

Defendants' Motion, p. 3 (emphasis added). These assertions by Defendants are without merit.

First, Defendants' assertion that public property is not exclusively possessed by any one person or entity fails to take into account -- and is directly at odds with -- the principles under Oklahoma law set forth above, which provide that water running in definite streams is state-owned property. *See City of Stillwater*, 524 P.2d at 944.

Second, Defendants ignore the fact that a possessory property interest need not be "exclusive" to support a trespass claim. Instead, a trespass claim may be brought by a person with a possessory interest against anyone with any inferior possessory property right (or no possessory property right at all). *See Cooperative Refinery Association v. Young*, 393 P.2d 537, 540 (Okla. 1964); *Lambert v. Rainbolt*, 250 P.2d 459, 461 (Okla. 1952). Stated another way, any so-called "exclusivity" must merely be as to persons with no possessory interest or a lesser possessory interest in the property.

Third, Defendants' naked assertion that "[b]ecause [public property] is open to all, there is no right to exclude others," *see* Defendants' Motion, p. 3, improperly suggests that public property may be used by private parties for any purpose (including by Defendants for the disposal of poultry waste), regardless of the effect of such use or invasion. Such an argument is absurd and contrary to law.<sup>3</sup> *See, e.g., Adderley v. Florida*, 385 U.S. 39, 47 (1966) ("Nothing in the Constitution of the United States prevents Florida from even-handed enforcement of its

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<sup>3</sup> Prohibitions against pollution of State waters -- which of course includes water running in definite streams, formed by nature, over or under the surface -- are found in the Oklahoma Code. *See, e.g.*, 27A Okla. Stat. § 2-6-105(A) & 82 Okla. Stat. § 1084.1.

general trespass statute against those refusing to obey the sheriff's order to remove themselves from what amounted to the curtilage of the jailhouse. The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated").

Finally, while claiming that it is "axiomatic" that public property cannot be the subject of a trespass claim, Defendants cite to no authority in support thereof and are wrong as a matter of law.<sup>4</sup>

Defendants' reliance on *New Mexico v. General Electric Co.*, 335 F. Supp. 2d 1185 (D.N.M. 2004), in support of dismissal is also unavailing for a number of reasons.<sup>5</sup> First, *New Mexico* was decided as a matter of New Mexico law, not Oklahoma law. Second, the district court dismissed New Mexico's claim for trespass as to the South Valley aquifer (and the Tenth Circuit Court of Appeals affirmed such dismissal) because, as the court found, New Mexico "has no possessory interest in the sand, gravel, and other minerals that make up the aquifer." *New Mexico*, 467 F.3d at 1248 n. 36. The district court further found that New Mexico did not have a usufructuary interest in groundwater sufficient to show injury to property. *New Mexico*, 335

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<sup>4</sup> Indeed, one need look no further than Oklahoma's criminal trespass statute or Oklahoma's case law governing permissible limitations on First Amendment speech on public property to dismiss outright Defendants' overreaching statement that "[b]ecause [public property] is open to all, there is no right to exclude others."

<sup>5</sup> Since Defendants have confused the issue in their motion, it bears repeating that, for purposes of its trespass claim, the State has not alleged "[b]lanket claims of dominion over 'all water.'" Defendants' Motion, p. 4. Rather, the State's possessory interest at issue for purposes of its trespass claim -- as pled in the Second Amended Complaint -- is not in "all waters," but rather in the "water in that portion of the Illinois Rivers Watershed located within the territorial boundaries of the State of Oklahoma which runs in definite streams, formed by nature, over or under the surface." See Second Amended Complaint, ¶ 119. Of course, as noted above in footnote 1, for purposes of claims in this action other than its trespass claim the State does assert a broader *parens patriae* / quasi-sovereign interest in all waters located within the Oklahoma portion of the Illinois River Watershed.

F.Supp.2d at 1234, 1240. Here, however, as discussed above, under Oklahoma law the State has a possessory property interest (through its ownership) in the water running in definite streams in the Illinois River Watershed within the boundaries of the State. *City of Stillwater*, 524 P.2d at 944 (such "public water" is "state owned"). Third, *New Mexico* was a groundwater case. For purposes of its trespass claim in this action, the State is not claiming an interest in groundwater not flowing in a definite stream (despite Defendants' straw man argument on page 6 of their Motion).

Defendants' other authority is not persuasive, either. For example, on page 5 of their Motion, Defendants cite to 33 U.S.C. § 10 and *Parm v. Shumate*, 2006 WL 2513856 (W.D. La. April 21, 2006), for the notion that a Louisiana Parrish sheriff could not arrest those boating, fishing and hunting on the Mississippi River for trespass. What Defendants fail to mention, however, is that their reliance on *Parm* is to a portion of the magistrate judge's report and recommendation that the district judge declined to adopt in 2006 WL 2513921 (W.D. La. Aug. 29, 2006), and which was a matter of Louisiana state law in any event. Specifically, the district court expressly held that the sheriff "had probable cause to arrest the Plaintiffs for trespassing in violation of [Louisiana law]." *Id.* at \*5. The district court did, however, adopt the magistrate judge's recommendation finding that 33 U.S.C. § 10 (to which Defendants also cite) did not provide the plaintiffs in *Parm* with the right to fish and hunt on the Mississippi River. *Id.* at \*3.

In sum, the State has sufficiently alleged a possessory property right in the water running in definite streams in the Illinois River Watershed within the boundaries of Oklahoma to support its trespass claim as pled in Count 6 of the Second Amended Complaint.

**B. The State has appropriately identified the property where the physical invasion and interference by Defendants has occurred**

Contrary to Defendants' assertions, *see* Defendants' Motion, pp. 7-8, the Second Amended Complaint does plainly set out (1) the State's possessory property interest, (2) that there has been an invasion of and interference with that possessory property interest, and (3) that Defendants are responsible for that invasion of and interference with that possessory property interest. With respect to the first element, as explained above, Paragraph 119 of the Second Amended Complaint identifies in detail the State's possessory property interest for purposes of its trespass claim: (1) "the water" (2) "in that portion of the Illinois River Watershed<sup>6</sup> located within the territorial boundaries of the State of Oklahoma," (3) "which runs in definite streams formed by nature, over or under the surface." With respect to the second element, Paragraph 119 of the Second Amended Complaint alleges "an actual and physical invasion of and interference with" this possessory property interest due to Defendants' poultry waste disposal practices. Finally, with respect to the third element, Paragraph 119 of the Second Amended Complaint alleges that the "Poultry Integrator Defendants"<sup>7</sup> are the ones who are responsible for this actual and physical invasion of and interference with this possessory property interest.

Stripped of its rhetoric, Defendants' real complaint appears to be that the State has not identified by name each and every definite stream within that portion of the Illinois River Watershed located within the territorial boundaries of the State of Oklahoma that has been invaded or interfered with. Defendants' complaint, however, ignores the nature of running water and the fact that the Illinois River Watershed is a unitary hydrologic unit. *See, e.g.,* Okla.

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<sup>6</sup> The term Illinois River Watershed is defined in paragraph 21 of the Second Amended Complaint.

<sup>7</sup> The term "Poultry Integrator Defendants" is defined in paragraph 19 of the Second Amended Complaint.



Admin. Code § 785:45-1-2 ("Watershed' means the drainage area of a waterbody including all direct or indirect tributaries"); Okla. Admin. Code § 785:45-5-29(b)(19) ("The nutrient limited watershed area for Tenkiller Reservoir is the entire watershed and drainage area of Tenkiller Reservoir, including the Illinois River and Caney Creek and all direct and indirect tributaries") (emphasis added); Okla. Admin. Code § 785:45-5, Appendix A (setting out Waterbody ID Numbers). *Cf.* 2 Okla. Stat. § 10-10.2 ("Eucha-Spavinaw Watershed' means the watershed for Lakes Eucha and Spavinaw located in Delaware County and Mayes County, Oklahoma, as further defined by Hydrologic Unit Code (HUC) 11070206 as compiled by the United States Geological Survey, Natural Resources Conservation Services"). The water running in definite streams within Oklahoma that makes up the Illinois River Watershed is a single hydrologic unit, and a trespass by Defendants to a part of that water is therefore a trespass by Defendants to the whole of that water.

### **III. Conclusion**

For the foregoing reasons, Defendants' Motion to Dismiss Count 6 of Second Amended Complaint [DKT #1235] should be denied.

Respectfully Submitted,

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